

## **The Ethics of Migration Policy Dilemmas**

### **The Undermining Mechanisms of 'Rule of Law' Objections: A Response to Song and Bloemraad (2022)**

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#### **Introduction**

In their article, "Immigrant legalization: A dilemma between justice and the rule of law," Sarah Song and Irene Bloemraad (2022) address rule of law objections to policies that would regularise the status of undocumented immigrants in the United States. On their view, justice requires that liberal democratic states (i.e., states that are committed to individual liberty and universal equality) provide pathways for undocumented immigrants to regularise their status. They also take seriously the concern that such policies, even if they are just, are inconsistent with a commitment to the rule of law. According to the rule of law objections to regularisation, such policies reward those who have broken immigration law and discourage others from respecting it in the future. Song and Bloemraad reject these rule of law objections, citing both normative and empirical considerations. After having done so, they give five clear and convincing rule of law reasons for supporting immigrant regularisation policies. They thus demonstrate that immigrant regularisation policies not only fail to undermine the rule of law, but in fact can serve as a means to correct the past and present failures of states to apply the rule of law to immigrants.

We do not disagree with Song and Bloemraad's account: rule of law and regularisation policies are not inconsistent, and in fact regularisation supports rule of law, properly understood. Our comment therefore is not a direct critique, but a call for deeper investigation into the motivations of the rule of law objections considered in Song and Bloemraad's account. We argue that the real purpose of these objections is not necessarily to serve as an alternative to the justice-based claims of undocumented immigrants, but as a way to undermine them. On our account, these rule of law objections accomplish this undermining task through the mechanisms of dog whistling, discrediting and distorting, and ostracizing.

## Rule of Law Objections in Context

In their article, Song and Bloemraad respond to three distinct objections to regularisation based on the rule of law. They interpret these rule of law objections charitably, and as philosophers, they abstract these arguments from their original context to examine them on their own merits. But these objections implicitly pit undocumented immigrants against the rule of law, thereby framing them as lawbreakers (i.e., inherent criminals). They also set up a dichotomy between rule-abiding immigrants (who wait in line for their turn) and lawbreaking undocumented immigrants. This implicit labelling of undocumented immigrants as inherent lawbreakers and cheaters is the first step in the undermining process.

This labelling of undocumented immigrants is evident even in the charitable framing of these three objections. Song and Bloemraad (2022, 14) state the objections thusly: "The first is that [legalisation] rewards and endorses lawbreaking". "A second way in which both collective legalization and individual regularization programmes are said to undermine the rule of law is by endorsing 'queue jumping'" (Song and Bloemraad 2022, 14). And third, "Specifically, the concern is that legalization programmes incentivize future unlawful actions by those not yet directly engaged in the immigration system—in particular, that large-scale amnesties create incentives for new unauthorized migration" (Song and Bloemraad 2022, 15). Each of these objections highlights undocumented immigrants' opposition to law or to those who follow the law by 'waiting in line.' Song and Bloemraad effectively refute these three rule of law objections, and they provide five clear and convincing arguments that rule of law, properly understood, in fact requires regularisation. But they do not address the way that the very framing of the 'rule-of-law objections' works to undermine the justice-based arguments they themselves endorse.

To explain how these objections work to undermine justice-based legitimate demands for regularisation in their very framing, we begin by looking to their source. For example, Song and Bloemraad cite Kris Kobach and the Center for Immigration Studies (CIS). As charitable interlocutors, Song and Bloemraad did not emphasise the background of these sources. But we will be less charitable. CIS has been deemed a hate group by the Southern Poverty Law Center (2016) while Kobach's ties to white supremacy groups have been well documented (Gettys 2018). Our contention is that these arguments are not really about the rule of law but about maintaining a white supremacist status quo by undermining the claims of immigrant rights movements. To be clear, our position is not the simple ad hominem that because white supremacists endorse certain arguments then by association those arguments are white supremacist. We agree that the validity of an argument should be assessed on its own merits and not on the character of those who espouse it. Our point is that in order to develop a satisfactory response to rule of law objections, we also need to make clear and account for their underlying political objectives and motives. Otherwise, we leave the real source of these objections untouched and unaddressed.

Just as the rule of law objections did not emerge simply from academic debates, neither have the justice-based arguments for regularisation. Demands for regularisation arise from social movements for immigrant rights. The rule of law objections, at least in the US, are responses to these movements. When we abstract the justice-based arguments and the rule of law objections from their context, we miss the way Kobach and CIS purposefully use rule of law objections as a way to uncharitably reframe the demands of the immigrant

rights movement as calls to blatantly disregard the law and welcome social chaos. This is nowhere near to what the immigrant rights movement is calling for and, in their hearts, Kobach and CIS know this. So, in addition to addressing these objections directly, as Song and Bloemraad have done, it is equally important to uncover their implicit reframing and expose their racist undertones. We turn to this task in the next section.

### **Mechanisms of the Rule of Law Objections**

Focusing on rule of law, as Kobach and CIS do, is a way of undermining the justice-based claims of undocumented immigrants. Using rule of law framing and language achieves this goal through at least three mechanisms: the dog whistle mechanism, the discrediting and distorting mechanism, and the ostracism mechanism. Using rule of law framing this way is not new. For example, the 'law and order' response to the US Civil Rights Movement of the mid-twentieth century was a dog whistle for anti-Black racism, and the dismissing of Black Lives Matter protestors as criminal rioters pre-emptively discredited their demands. These are both examples of the undermining work of rule of law rhetoric. The dog whistle and discrediting and distorting mechanisms work alongside the ostracism mechanism. The ostracism mechanism works to keep some people subordinated by claiming that they are inherently unfit for membership in a certain community.

The first way these rule of law objections undermine legitimate immigration justice claims is by acting as a dog whistle. In his now famous *Dog Whistle Politics*, Ian Haney Lopez (2015) carefully shows how rule of law arguments have been central to 'dog whistle politics.' For Haney Lopez, 'dog whistle politics' are a means by which racist policies can be supported—or anti-racist remedies opposed—without having to express the racist motivations that undergird such support or opposition. Simple examples of dog whistles are 'urban' or 'inner city,' when one is really speaking of Black people or Black communities. Haney Lopez explains how rule of law arguments, under the name 'law and order' were key parts of Richard Nixon's 'Southern Strategy' to siphon off white racist voters from the Democratic Party. Without having to explicitly say that he would oppose Black interests, he could say that he stood for 'law and order,' and these anti-Civil Rights voters would understand what he meant. Similarly, Ronald Reagan's 'War on Drugs' gave him plausible deniability when he and his supporters damaged Black communities with heavy policing and incarceration.

Rule of law arguments have played a similar dog-whistle function in their deployment against immigrant rights. When politicians and pundits claim that rule of law is in tension with regularisation policies, they implicitly or explicitly label undocumented immigrants as not just lawbreakers but inherently criminal. This is evident in continued uses of the term 'illegal immigrant,' which acts as a dog whistle for non-white (especially Latinx) immigrants for those who already hold white supremacist or xenophobic views. In addition to implicitly labelling undocumented immigrants as 'illegal,' the rule of law opposition to regularisation implicitly signals to those who already substantially agree with Kobach and CIS that they should mobilise against regularisation.

But one need not be an avowed white supremacist or openly xenophobic to find the rule of law objections appealing. While labelling undocumented immigrants as lawbreakers is a dog whistle in the ears of some members of the public, its role is more complicated for others. For people who do not have a settled view in the political struggle over immigrant

rights, labelling unauthorised immigrants as lawbreakers works to pre-emptively discredit their claims for justice. This discrediting mechanism is best understood as a kind of epistemic injustice. Philosophers Miranda Fricker (2007), José Medina (2012), and Kristie Dotson (2014), among others, have described a kind of injustice in which one is denied their capacity to testify, contribute to collective knowledge production, or have their claims taken up by others because of their membership in some marginalised group. In this case, by setting up undocumented immigrants in opposition to rule of law, their justice-based claims can be pre-emptively discredited because they are lawbreakers or, according to the more common label, 'illegal' immigrants. Similarly, by opposing undocumented immigrants to those who 'wait in line,' the rule of law objections paint undocumented immigrants as cheaters. A related epistemic injustice also occurs: 'rule of law' framing distorts immigrants' demands for fair treatment into something like 'rewarding lawbreakers.' If one is successful in making the immigrant rights debate fundamentally about the rule of law, it is very easy to dismiss the voices of undocumented immigrants on the basis that they are criminals and cheaters.

The dog whistle mechanism and the discrediting and distorting mechanism are closely intertwined with the ostracism mechanism. Painting undocumented immigrants as lawbreakers and, logically, criminals or 'illegals,' is a way of emphasising their basic incompatibility with American life. Undocumented immigrants are 'not like us.' Ron Sundstrom and David Kim (2014) argue that xenophobia is defined by civic ostracism, which itself centres on the idea that some people are basically unfit to be members of a given community because they do not share the ethical culture of that community. Rule of law objections to regularisation articulate the idea that undocumented people, in virtue of their status as lawbreakers, are fundamentally unfit for membership in the United States. As such, these objections both depend on and reinforce the civic ostracism of undocumented immigrants.

In short, the rule of law objections paint undocumented immigrants as lawbreakers and cheaters. This rhetorical work then is used as a dog whistle to foment support from those already sympathetic to xenophobic ideals, to discredit and distort the demands of social justice movements, and to depict undocumented immigrants as inherently incompatible with American values.

## Conclusion

In summary, while Song and Bloemraad have done an excellent job of responding to rule of law objections on their merits, we have argued that the impact of these objections goes far beyond the literal claims they make. Our suspicion is that an appeal to the rule of law is more often used as a cover for racism than it is a defence of a core political value. Song and Bloemraad have provided five convincing rule of law arguments in support of regularisation policies, which conveniently have skipped the minds of rule of law proponents like Kobach and the CIS. This, we suspect, is because Kobach and CIS advance rule of law arguments only for the sake of delegitimizing and further subordinating undocumented immigrants. We cannot have an honest discussion about immigration legalisation policies, as Song and Bloemraad have so generously invited us to do, when only one side is adhering to the norms of a genuine debate and the other is operating with a sinister agenda. To have an honest discussion we not only need to show where the arguments from Kobach and the

CIS go astray, but we also need to do the less-than-charitable work of calling them out and meeting them where they are coming from.

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### **About the “Dilemmas” project**

This commentary contributes to the [‘Dilemmas’ project](#) at the EUI’s Migration Policy Centre. Dilemmas analyses and debates fundamental ethical dilemmas in policy-making on migration and refugee protection.

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